U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-P-

DATE: APRIL 28, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

The Applicant, a native and citizen of Mexico, seeks to become a lawful permanent resident based on his U nonimmigrant status. *See* Immigration and Nationality Act (the Act) section 245(m), 8 U.S.C. § 1255(m). The U classification affords nonimmigrant status to crime victims, who assist authorities investigating or prosecuting the criminal activity, and their qualifying family members. The U nonimmigrant may later apply for lawful permanent residency.

The Director of the Vermont Service Center denied the Form I-485, Application to Register Permanent Residence or Adjust Status (adjustment application), concluding that a balancing of the mitigating and adverse factors did not establish that the Applicant's adjustment application merited a favorable exercise of discretion.

On appeal, the Applicant submits a brief and additional evidence, asserting that the Director abused discretion in denying the Applicant's adjustment application without considering all the mitigating factors in the record.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

A U nonimmigrant may adjust status to that of a lawful permanent resident at the discretion of U.S. Citizenship and Immigration Services (USCIS). Section 245(m) of the Act. When exercising its discretion, USCIS may consider all relevant factors, both favorable and adverse, but the U nonimmigrant ultimately bears the burden of showing that discretion should be exercised in his or her favor. 8 C.F.R. § 245.24(d)(11).

The absence of adverse factors may be sufficient to merit a favorable exercise of administrative discretion. 7 USCIS Policy Manual A(9), https://www.uscis.gov/policymanual. However, where adverse factors are present, the applicant may submit evidence to establish mitigating factors. 8 C.F.R. § 245.24(d)(11). Depending on the nature of any adverse factors, the applicant may be required to demonstrate clearly that the denial of adjustment of status would result in exceptional and extremely unusual hardship, but such a showing might still be insufficient if the adverse factors

are particularly grave.[1] *Id.*

II. ANALYSIS

The Applicant claims to have continuously resided in the United States since entering without inspection, admission, or parole in December 1996 when he was approximately years old. The record indicates that the Applicant filed a Form I-918, Petition for U Nonimmigrant Status (U petition), which was approved in March 2012, affording him U nonimmigrant classification based on having been a victim of an aggravated assault in 2005. However, while waiting the requisite period to pursue the instant adjustment application, the Applicant was arrested and convicted on charges relating to drinking and driving, as set forth below:

- The Applicant was arrested in 2013 for driving while intoxicated-first offender (DWI) and was convicted of the same in 2013. He was sentenced to 25 days in jail and his license was suspended for one year until 2014.[2]
- In 2014, the Applicant was arrested for actual physical control of a vehicle while under the influence of intoxicating liquor. He pled guilty and was convicted in 2014. The Applicant was fined and sentenced to 30 days jail (20 days suspended) and 18 months of unsupervised probation. In addition, he was ordered to undergo an addiction evaluation and to complete a 24/7 Sobriety Program (Secure Continuous Remote Alcohol Monitoring (SCRAM))[3] for one year.

Thereafter, in June 2015, the Applicant filed his adjustment application in which he acknowledged only his 2013 DWI conviction. Similarly, in his accompanying statement, the Applicant only briefly touched on his first DWI conviction and sentence, stating that he spent four days in jail and paid a fine following his conviction. He did not address the underlying circumstances of his arrest, his alcohol use or abuse, and any counseling or rehabilitation assistance he may have sought. Instead, he summarily asserted that he had learned his lesson and realized the importance of following the law. He also specifically asserted that he had changed since his 2013 arrest and had "never broken the law again." However, this assertion of remorse and rehabilitation following the 2013 conviction is directly contradicted by the Applicant's subsequent 2014 arrest, which occurred within the same month that the one-year period of suspension of his license had finally expired. The underlying 2014 police report indicates that the reporting police officer received a broadcast of a possible reckless driver and later encountered the Applicant's vehicle matching the description the officer had received. The Applicant's car was found "obstructing" a lane of a highway and the Applicant was

[1] For example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns. *Id.*

[2] The record indicates the Applicant was allowed an occupational license for limited household and employment purposes, which only authorized him to operate a vehicle with a deep lung ignition interlock device during certain hours of each day.

[3] The record indicates that under the SCRAM program, the Applicant was required to wear an ankle bracelet, which tested him for the presence of alcohol concentration for the duration of the yearlong program.

found slumped in the vehicle with the vehicle still in gear and the Applicant's foot on the brake. The officer also located an open bottle of beer in the center console, although the Applicant also reportedly indicated that he had two drinks.

In response to the Director's request for evidence relating to both of the Applicant's arrests, the Applicant submitted an updated statement in which he apologized for omitting his second arrest in his application and original statement. He explained that he did not know what to do or where and how to go about getting information (presumably about his 2014 arrest), and that he had been "afraid of not being able to do anything [and so] . . . did not say anything." The Applicant also expressed remorse, indicating that he now knows what he did was wrong. In briefly addressing his 2014 arrest, he noted that he completed all the requirements of his sentence, including serving 10 days in jail and completing the SCRAM bracelet program and driving under the influence (DUI) classes. He asserted again that he had become more responsible and followed and respected the law. However, as with his previous statement, the Applicant did not provide any probative testimony regarding the circumstances leading to his arrest, his past and continued use of alcohol, and his attempts at rehabilitation.

In addressing the equities in his case, the Applicant noted his long-term presence in the United States and his lawful permanent resident wife and three minor U.S. citizen children (approximately and years old). The Applicant stated that he is the sole provider for his family, while his spouse takes care of their children and home, which they own. He asserted that he tries to be a good husband and father and works hard to provide for his family and give them a better future in the United States. He indicated that he thinks of the United States as his home and wishes to remain here to ensure that his children have a father and the opportunities he did not have growing up. The Applicant indicated that he would have no employment or residence if he returned to Mexico as his mother had passed away and his father and brother are in the United States, although he has provided no evidence of these family ties in the United States. He stated that if he returned to Mexico, it would be difficult for him to provide for his family financially and that they would lose their home and vehicles in the United States, as his spouse would be unable to cover the household expenses, including homeowners insurances, automobile insurance, and medical expenses, on her own. Similarly, he asserted that his family would also suffer if he took them with him to Mexico, because he could not provide for them there and his children would not receive a good education or be safe in Mexico. The Applicant also stated that he stills suffers physically and mentally because of the violent crime committed against him, but he provided no substantive information regarding the harm he claims to continue to suffer or its daily impact on his life and family. He indicated that he was helpful to law enforcement in the past regarding the crime and expressed his willingness to provide assistance in the future again should the perpetrators be located.

The record does not include any statements from the Applicant's spouse, father, or other family members, but it contains several reference letters from the Applicant's prior and current employers, friends, and others members of the community, including from the church where the Applicant volunteers. Although the letters generally attest to the Applicant's good character, they do not address whether the authors are aware of the Applicant's DWI criminal history or his past or current

use of alcohol in light of such history. The Applicant also proffered a handwritten 2016 letter from an individual generally confirming the Applicant's attendance at a local Alcoholics Anonymous (AA) group, without specifying the duration or frequency of his attendance. The remaining documentary evidence below of the Applicant's equities included: the Applicant's marriage registration record; the birth certificates of his minor children; a local county sheriff's office letter confirming the Applicant's successful completion of the SCRAM bracelet program in 2015; a copy of the Applicant's SCRAM program agreement; 2014 record of the Applicant's completion of a 16-hour DWI seminar in compliance with the requirements of the court mandated addiction evaluation; his tax returns and income evidence for 2012 through 2015; copies of the Applicant's mortgage and other household expenses records; and two untranslated pages from a Spanish language website relating to incidents of violence in Mexico without further elaboration of their relevance to the Applicant's particular situation.

On appeal, the Applicant contends that his willing disclosure of his 2013 conviction shows that his omission of his 2014 conviction was not deliberate or intended to obtain an immigration benefit. He asserts that having only an eighth grade education, he was simply "confused by reporting requirements." However, irrespective of the Applicant's educational background, the record indicates that he was represented and had legal assistance in preparing his application. Further, given that the Applicant understood that he was required to provide information about his 2013 arrest and conviction, his explanation that he was "confused" about having to report his second arrest and conviction is not reasonable, particularly as the instant application specifically inquired about his arrests or convictions without any numerical limitations. Contrary to his assertions, the Applicant did not merely omit references of his second arrest, but rather, affirmatively and falsely stated in his 2015 supplemental statement that he had never broken the law again after his 2013 arrest, when, in fact, he had been arrested, convicted, sentenced, and imprisoned a second time in 2014 before he filed his adjustment application. The Applicant does not acknowledge or address his misrepresentation on appeal.

The Applicant maintains that the Director abused discretion by denying his adjustment application based on two misdemeanor convictions and on the Applicant's failure to disclose his second arrest without any further analysis and without giving proper weight to the positive equities in his case. He notes that he pled guilty in both his criminal cases rather than dragging the cases out at the cost of taxpayers and the judicial system and that he complied with all the requirements of his convictions. The Applicant asserts that this demonstrates that he took responsibility for his actions and establishes his remorse, rehabilitation, and his respect for U.S. laws, contrary to the Director's finding. He contends that his respect for U.S. laws is also demonstrated by his prior assistance to law enforcement in the investigation of the aggravated assault committed against him, despite the risk of possible retaliation. The Applicant also notes his completion of the 16-hour DUI course and points to the updated Form I-693, Report of Medical Examination and Vaccination Record, requested by the Director, indicating that the Applicant reported that he has not used alcohol since 2014 and is not alcohol or drug dependent.

We recognize the positive equities in the Applicant's case. However, the Applicant has not shown that those positive equities outweigh the adverse factors in his case. The Applicant was twice arrested and convicted on drinking and driving related charges within the past few years while waiting to seek a benefit from the U.S. government, which are significant adverse factors. Importantly, despite the serious consequences of his first DWI conviction, including a one-year suspension of his license during which time he had a restricted occupational license that allowed him to drive only vehicles with a deep lung ignition interlock device and for limited purposes, the record shows that the Applicant engaged in the same or similar criminal conduct almost immediately after the expiration of his suspension period. Although we recognize the Applicant's completion of the court-mandated requirements of his sentences, as discussed, his written statements do not provide any probative accounts of the underlying circumstances of his arrests, particularly his 2014 arrest, his past and current alcohol use, and his past and current attempts at rehabilitation. The record also shows that the Applicant initially withheld information about his second arrest and conviction when he filed his application and affirmatively stated that he had been arrested only once.

The Applicant further contends on appeal that the Director did not consider whether denial of adjustment would result in exceptional and extremely unusual hardship, which he maintains is required whenever USCIS determines that the positive factors in a case do not outweigh the adverse factors. He asserts the record provides ample evidence of such hardship to the Applicant, his lawful permanent resident spouse, and his minor U.S. citizen children. However, neither the Act nor the implementing regulations require a specific determination regarding exceptional and extremely unusual hardship, although USCIS will consider whether such hardship exists to overcome particularly grave adverse factors. 8 C.F.R. § 245.24(d)(11). Regardless, our review indicates that the Director did properly consider evidence of hardship in the record as a mitigating factor, but ultimately concluded that the favorable equities in the Applicant's case did not outweigh the negative factors. The primary evidence of hardship in the record was the Applicant's statements, which briefly discussed the financial, physical, and emotional hardships that his family would suffer upon his removal from the United States. On appeal, counsel for the Applicant asserted that the Applicant's spouse also suffers from anxiety and depression stemming from witnessing the 2005 assault against the Applicant and that she has constant pain due to physical ailments resulting from a car crash. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. The Applicant here did not submit any statements addressing these hardship claims asserted on appeal, nor did he proffer any statements from his spouse. Although evidence submitted with the Applicant's 2011 U petition demonstrates the psychological and emotional harm that the Applicant suffered in the past as a result of the 2005 assault, his statements during these proceedings did not discuss any ongoing emotional and psychological harm that he or his spouse continue to suffer or the injuries his spouse sustained from the referenced car accident.

The Applicant also maintains that the denial of his adjustment application in the exercise of discretion is not justified in the absence of serious adverse factors, such as serious violent crimes, crimes involving sexual abuse of a child, multiple drug-related crimes, or terrorism concerns.

However, even in instances where there are no adverse factors, USCIS is not required to exercise favorable discretion. Further where adverse factors are present, as is the case here, USCIS must consider them in its exercise of discretionary authority, and it is incumbent on an applicant to present mitigating factors to satisfy his or her burden of demonstrating that such discretion should be favorably exercised. 8 C.F.R. § 245.24(d)(11). As stated, the Applicant has not demonstrated that the mitigating factors outweigh the adverse factors in his case.

III. CONCLUSION

The favorable and mitigating factors in the present case are the Applicant's lawful permanent resident spouse and three minor U.S. citizen children in the United States and his care and support of them; the financial and emotional hardship to the Applicant and his family members that would result from his removal; his long-term presence in the United States; the harm he suffered as a victim of qualifying criminal activity; his assistance to law enforcement regarding his victimization; his employment history; the character references from his employers and friends; his history of paying taxes in the United States; evidence of the completion of his probation requirements, including the SCRAM program and DUI classes; and some evidence of his ongoing attendance at AA meetings. The adverse factors are the Applicant two convictions involving drinking and driving, both of which occurred after he had been granted his U nonimmigrant status and while he was waiting to pursue his adjustment application before USCIS; the recent nature of his arrests and convictions; the recency of his completion of probation which was still pending at the time he filed this application; his evasive statements to USCIS regarding his criminal history; and insufficient evidence of remorse and rehabilitation, including the lack of probative testimony from the Applicant regarding the underlying circumstances of his arrests, his past and current use of alcohol, and his past and current participation in rehabilitation programs. When viewed in their totality, based upon our discretion, the adverse factors in the present case outweigh the favorable and mitigating factors. Accordingly, the Applicant has not demonstrated that his adjustment of status is warranted in the exercise of favorable discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of G-P-*, ID# 234494 (AAO April 28, 2017)